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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-952

EDDIE C. THOMAS,

Petitioner,

v.

THE REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, WILLIAM H. SKINNER, J. FRANK HALEY, and RALPH MILES, as members and as constituting the Review Board of the Indiana Employment Security Division,

and

BLAW-KNOX FOUNDRY & MACHINERY, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Indiana

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE FUND, INC. AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Americans United for Separation of Church and State Fund, Inc. respectfully moves this Court for leave to file the accompanying Brief in this case as Amicus Curiae. The consent of the Attorney for the Petitioner herein has been obtained but Counsel for Respondents has refused to consent to the filing of a Brief by Americans United for Separation of Church and State Fund, Inc. as Amicus Curiae.

The applicant, Americans United for Separation of Church and State Fund, Inc. has an interest in this case in that it and its sister organization, Americans United for Separation of Church and State, are the only national interfaith organizations dedicated exclusively to defending religious liberty and the constitutional principle of church-state separation. Americans United for Separation of Church and State has been involved in most of the major cases reaching this Court concerning the application of the establishment clause of the First Amendment to the United States Constitution. Americans United Fund was formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution. This organization is involved in extensive litigation of First Amendment free exercise and establishment issues throughout the United States.

The Amicus Curiae brief raises constitutional issues not explicitly argued by Petitioner's counsel, who has requested that this brief be submitted. The Amicus brief directs itself to the question of whether the Indiana Supreme Court, in applying the secular purpose test of *Braunfeld* v. *Brown,* 366 U.S. 599 (1961), failed to observe the teachings of *Sherbert* v. *Verner,* 374 U.S. 398 (1963). The Amicus brief also directs its attention to the question of whether the granting of unemployment compensation benefits to one whose employment is terminated because of religious convictions violates the establishment clause of the First Amendment. The constitutional arguments made in the Amicus Curiae brief are central to the disposition of this matter and at least as to certain of the points made

will not otherwise be before this Court unless leave is granted for the filing of the Amicus Curiae brief.

Respectfully submitted,

LEE BOOTHBY

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TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF i

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE FUND, INC. AS AMICUS CURIAE 1

INTEREST OF THE AMICUS CURIAE 2

QUESTION PRESENTED 3

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I.

The Indiana Supreme Court in Applying the Secular Purpose Test of *Braunfeld* v. *Brown* Failed to Observe the Teachings of *Sherbert* v. *Verner* 4

II.

The Granting of Unemployment Compensation Benefits to One Whose Employment is Terminated Because of Religious Convictions Does Not Violate The Establishment Clause of the First Amendment 11

CONCLUSION 15

TABLE OF AUTHORITIES

CASES:

Abington School District v. Schempp, 374 U.S. 203 (1963) 13

Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969) 10

Braunfeld v. Brown, 366 U.S. 599 (1961).. 3, 4, 5, 6, 7, 8, 10

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 2

Table of Authorities Continued

Page

Everson v. Board of Education, 330 U.S. 1 (1947) ..11, 12

Heilberg v. Fixa, 236 F.Supp. 405, 408 (N.D. Cal., 1964) 10

Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948) 12

Lemon v. Kurtzman, 403 U.S. 602 (1971) 2

Meek v. Pittenger, 421 U.S. 349 (1975) 2

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 5

N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 5

Sherbert v. Verner, 374 U.S. 398 (1963)..... 3, 5, 6, 7, 8, 9, 10, 11, 14

Thomas v. Collins, 323 U.S. 516, 530 (1945) 7

Thomas v. Review Board of the Indiana Employment Security Division, 391 N.E.2d 1127 (1979)..... passim

Walz v. Tax Commission of City of New York, 397 U.S. 664 (1970) 14

Wisconsin v. Yoder, 406 U.S. 205 (1972) 8, 10

Women Strike for Peace v. Hickel, 420 F.2d 597, 605 (D.C. Cir. 1969) 10

Zorach v. Clauson, 343 U.S. 306 (1952) 12, 13

CONSTITUTIONAL AUTHORITIES:

United States Constitution—

Amendment I ..... passim

Amendment XIV 2

MISCELLANEOUS:

Kauper, Religion and the Constitution (1964) 5

Tribe, L. American Constitutional Law (1978) 9, 14

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BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE FUND, INC. AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Americans United for Separation of Church and State Fund, Inc. is a nonprofit corporation formed to maintain and advance civil and religious liberties

through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the Constitution of the United States.

Americans United Fund is governed by a Board of Trustees composed of members of many religious organizations as well as individuals who are members of no religious body but who are concerned with the preservation of the separation of church and state.

The Board of Trustees of Americans United Fund is composed of the Board of Trustees of Americans United for Separation of Church and State, a sister organization with some forty thousand members of various religious beliefs and of no religious belief in all states of the United States, including the State of Indiana. Americans United Fund is involved in extensive litigation of First Amendment free exercise and establishment issues throughout the United States.

Americans United for Separation of Church and State has been involved in almost every major case coming before this Court dealing with the question of the establishment clause of the First Amendment to the United States Constitution, including such cases as *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971); *Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756 (1973), and *Meek* v. *Pittenger,* 421 U.S. 349 (1975).

Americans United Fund is particularly interested in the issues raised in this case because although this organization is firmly committed to the preservation of the principles embodied in the establishment clause of the First Amendment, it believes that this clause must not do violence to the free exercise clause. The brief of this Amicus Curiae will argue that the estab-

lishment clause of the First Amendment to the United States Constitution is not violated by accommodating claimant's constitutional rights under the free exercise clause of the First Amendment.

QUESTION PRESENTED

Whether the application of the disqualifying provisions of the Indiana Employment Security Act to the Petitioner, a Jehovah's Witness, constitutes a denial of his First Amendment right to the free exercise of religion when he voluntarily terminated his employment in an armament factory because his religious beliefs prevented him from participating in the production of armaments or in any war-related activities.

SUMMARY OF ARGUMENT

The Indiana Supreme Court, in applying the secular purpose test of *Braunfeld* v. *Brown,* 366 U.S. 599, 607 (1961), failed to observe the teachings of *Sherbert* v. *Verner,* 374 U.S. 398 (1963). It is our position that this Court discarded the earlier secular purpose test used in *Braunfeld* v. *Brown* when handing down its decision in *Sherbert* v. *Verner.* The Court in *Sherbert,* although not specifically overruling its earlier decision, made clear that its threshold inquiry was substantially different from that of *Braunfeld.* Under *Sherbert* there is a much stronger showing required of the state than was required under the "secular purpose test" of *Braunfeld.*

The Indiana Supreme Court failed to apply the teachings of *Sherbert* when it narrowly limited the *Sherbert* ruling to a state unemployment availability-for-work requirement. Rather than being so limited, the *Sherbert* test is to be applied in all First Amend-

ment cases, particularly those involving the free exercise clause of the First Amendment to the United States Constitution. In failing to apply *Sherbert* the Indiana Supreme Court reached a result which denies claimant his constitutional rights under the First Amendment.

The establishment clause of the First Amendment does not prohibit the granting of unemployment compensation benefits to one whose employment is terminated because of religious convictions, and the Supreme Court of Indiana misinterpreted the decisional law concerning the establishment clause of the First Amendment. This Court's prior decision in *Sherbert* embraces the concept of religious accommodation.

ARGUMENT

I.

THE INDIANA SUPREME COURT IN APPLYING THE SECULAR PURPOSE TEST OF *BRAUNFELD* v. *BROWN* FAILED TO OBSERVE THE TEACHINGS OF *SHERBERT* v. *VERNER*

The majority opinion of the Indiana Supreme Court in the instant case appears to ignore seventeen years of decisional law when it anchors its opinion on the secular purpose test of this Court's decision in *Braunfeld* v. *Brown,* 366 U.S. 599, 607 (1961).

The right to believe and worship according to a personal belief in a supreme being has been repeatedly declared by our courts to be a cherished and fundamental right central to an individual's freedom. It was not by accident that the first sentence of our Bill of Rights in exacting language prohibits Congress from making any law respecting an establishment of religion

or prohibiting its free exercise. The constitutional fabric of our nation has woven within it the concept that religious freedom is to be protected as an exhalted right. It is basic that the free exercise of religion occupies a fundamental and preferred position. *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943).

As the late Professor Kauper stated: "Of all the constitutional guarantees, the protection of religious liberty has been the most exhalted." P. Kauper, *Religion and the Constitution* 19 (1964) (and the cases cited therein).

The Chief Justice in referring to the preferential position of the First Amendment recently stated it this way: "The values enshrined in the First Amendment plainly rank high 'in the scales of our national values, ..." *N.L.R.B.* v. *Catholic Bishop of Chicago,* 440 U.S. 490 (1979).

In spite of the repeated judicial assertions revering the free exercise clause of the First Amendment, those individuals who laid claim to these rights in our courts rarely prevailed against the government prior to the decision of this Court in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), when the Court first articulated its now historic ruling concerning free exercise rights under the First Amendment to the United States Constitution.

The Indiana Supreme Court in blinding its eyes to the holding in *Sherbert* cites as its only authority concerning this sensitive First Amendment free exercise area the 1961 pre-*Sherbert* decision in *Braunfeld.* See references made by the Indiana Supreme Court in its

decision in the instant case, 391 N.E.2d 1127, 1129, 1130-31 (1979).

The Indiana Supreme Court in a flashback to the 1961 decision in *Braunfeld* adopted the pre-*Sherbert* holding which stated that where the burden of a state regulation imposed on a "free exercise" right, the court need only determine if the purpose and effect of the state regulation in question is to advance the state's secular goals. *Braunfeld, supra* at 599.

It is submitted, however, that this Court made a major shift in balancing the interests of the state against the free exercise rights of an individual in the landmark case of *Sherbert* v. *Verner, supra.* The Court in *Sherbert,* although not specifically overruling its earlier decisions, expanded the scope of the previously dormant free exercise clause as well as the extent of the required inquiry into the state's interest set up in opposition to the free exercise clauses. *Sherbert* has given the free exercise clause its present vitality. It established a new balancing test to resolve the competing interests existent when First Amendment rights are at stake.

In *Sherbert,* Adelle Sherbert, a member of the Seventh-day Adventist Church, was fired because her religious beliefs would not permit her to work on Saturday, which was her Sabbath. Mrs. Sherbert found it impossible to locate other employment which did not demand secular Saturday employment. She filed a claim for unemployment compensation benefits. The state denied her claim for unemployment benefits, making the determination that she was not entitled to benefits because she had not made herself available for suitable work when offered by the state employment office. *Id.* at 401.

The Court in a substantial deviation from this Court's earlier ruling in *Braunfeld* wrote that in this highly sensitive constitutional area "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation, *Id.* at 406 citing *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945).

In *Sherbert,* the Court in considering the competing interests announced the test for a free exercise case: 1) Is there a burden imposed on the exercise of religion? *Id.* at 403. 2) If there is such a burden, is the infringement justified by a compelling governmental interest? *Id.* at 406. 3) Even if a compelling governmental interest has been shown to exist, is there any less intrusive, alternative means available to meet the state's objective? *Id.* at 407.

The Court made clear that not every governmental interest will overbalance a free exercise claim. The interest must be shown to involve a grave and paramount state concern. *Id.* at 405.

It appears that one of the most important changes in the Court's view when deciding a case where the delicate concerns of religious liberty are at stake was the Court's announcement that it is the government and not the individual that has the burden of establishing 1) that there is a compelling governmental interest and 2) the existence of no less intrusive means whereby the state may carry out any such vital state objective.

In *Sherbert,* the Court made clear that its threshold inquiry was substantially different from that of *Braufeld.* There was to be a much stronger showing by the state than that required under the "secular purpose test" of *Braunfeld.* It seems that this Court has discarded the *Braunfeld* test. The *Braunfeld* Court

speaks of exercising the "most critical scrutiny" when an individual asks the Court to strike down governmental action that only has an indirect impact on his free exercise claim. *Braunfeld, supra* at 606. In *Sherbert* the Court demands a searching examination of the government's claimed compelling state interest and the impediment to those objectives that flow from an outright exemption for the individual.

One of the most significant post-*Sherbert* decisions is this Court's holding in *Wisconsin* v. *Yoder,* 406 U.S. 205, 215 (1972), where this Court, citing *Sherbert,* held that there must be a state interest of significant magnitude to override an individual claim to protection under the free exercise clause: "The essence of all that has been said and written on the subject is that only those interests of the highest order can overbalance legitimate claims to the free exercise of religion."

In *Yoder,* the Court upheld the right of Amish parents to remove teenage children from the public schools and held unconstitutional, as applied to members of the Amish religion who had graduated from the eighth grade, the provisions of the state's compulsory education laws.

In *Yoder,* the state advanced a number of arguments seeking to meets its burden of establishing a compelling state interest. This Court, however, rejected each argument advanced by the state and pointed out that the alleged overriding interest of the state must be carefully and sensitively examined. This, the Indiana Supreme Court failed to do. Instead of following the teachings of *Sherbert* and its progeny, the court reverted to the underdeveloped free exercise concept embodied in the *Braunfeld* decision.

In the instant case, the State of Indiana did not even attempt to meet the requirements of the *Sherbert* test. In fact it admitted that there was no compelling state interest involved. Pet.App. 13a; 381 N.E. 2d 888, 892 (1979). Professor Lawrence Tribe in his recent authoritative book on the Constitution, recognizes the continuing validity of the *Sherbert* test. L. Tribe, *American Constitutional Law* 851-865 (1978).

Of significance to the facts of this case is this Court's discussion of public welfare benefits. *Sherbert, supra* at 405. The basic decision in *Sherbert* was itself a reaffirmation of a basic principle previously announced by this Court that no person should be excluded from receiving benefits of public welfare legislation as a result of his or her religious beliefs. *Id.* at 410.

In *Sherbert* this Court said: "*If the* purpose or *effect of a law is to impede the observance of one or all religions* or is to discriminate invidiously between religions, *that law is constitutionally invalid even though the burden may be characterized as being only indirect.*" *Id.* at 404 (emphasis added).

It is respectfully submitted that the Indiana Supreme Court failed to apply the teachings of *Sherbert* when it narrowly limited the *Sherbert* ruling to a state unemployment availability for work requirement. *Sherbert* spoke not just to unemployment compensation eligibility requirements. Unless the state shows a compelling public interest, *Sherbert* teaches that the conditions upon any public welfare benefits cannot be sustained if they so operate, whatever their purpose, to inhibit or deter the free exercise of First Amendment freedoms.

It is equally clear that the decision in *Sherbert* is not merely applicable to governmental action relating

to public welfare. The decision in *Yoder* reinforced and amplified the Court's earlier holdings in *Sherbert* that the free exercise clause of the First Amendment requires the state to render substantial deference to religiously motivated behavior in the application of its laws and regulatory schemes. The balancing test announced in *Sherbert* was not designed to narrowly apply only to unemployment compensation or even public welfare cases. Rather, it represents the result of evolving judicial standards concerning the free exercise doctrine. The decisions of this Court in *Sherbert* and *Yoder* represent a departure from the secular purpose test applied in *Braunfeld.* The *Sherbert* test is more sensitive to the religious concerns of individuals than the secular purpose test which was applied in *Braunfeld.*

Although the *Sherbert* test was applied within the context of the free exercise situation, it has also been applied to a variety of other First Amendment issues. *Women Strike for Peace* v. *Hickel,* 420 F.2d 597, 605 (D.C. Cir. 1969); *Barnett* v. *Rodgers,* 410 F.2d 995, 1000 (D.C. Cir. 1969); *Heilberg* v. *Fixa,* 236 F.Supp. 405, 408 (N.D. Cal. 1964).

The continued application of the *Sherbert* test is the best protection against a government that from time to time loses sight of the fact that its most compelling governmental concern should be to insure the protection of those rights guaranteed by the Bill of Rights. This Court again should reassert the proposition that "a regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Yoder, supra* at 220. This requirement may not be met by merely

asserting that if the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the state's secular goals, the statute is valid despite its indirect burden on religious observance. To so hold would place in jeopardy the now well established free exercise rights of all Americans.

II.

THE GRANTING OF UNEMPLOYMENT COMPENSATION BENEFITS TO ONE WHOSE EMPLOYMENT IS TERMINATED BECAUSE OF RELIGIOUS CONVICTIONS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The Indiana Supreme Court has raised the spectre of the establishment clause. It contends that the granting of unemployment benefits to petitioner would result in a violation of the establishment clause of the First Amendment. As the dissenting opinion of the State Supreme Court and the majority decision of the Court of Appeals in this case pointed out, a decision favorable to Mr. Thomas in this case in no way fosters the establishment of the Jehovah's Witness religion in the State of Indiana, but merely reflects "the governmental obligation of neutrality in the face of religious differences." *See Sherbert* v. *Verner, supra* at 309.

Sherbert is not merely a decision dealing with the free exercise clause. As an establishment case, *Sherbert* is significant in that it makes clear that exemptions solely on the basis of religion are not necessarily establishments of religion if they are designed to protect the free exercise of religion.

In *Everson* v. *Board of Education,* 330 U.S. 1 (1947), this Court held that the establishment clause incor-

porates the principle of separation of church and state. It not only prohibits an established church and preferences among religions, but it seeks to isolate the affairs of government from matters religious in nature.

The following year, this Court in *Illinois ex rel. McCollum* v. *Board of Education,* 333 U.S. 203 (1948), considered a case in which a parent-taxpayer brought suit to halt a program of "released time" for sectarian religious education conducted on the public school premises. The aid to religion in *McCollum* was not merely incidental to a secular purpose but was a direct encouragement to religion. This was not a case where the state was merely seeking to protect the free exercise of religion. In effect the state threatened the free exercise of religion of those pupils not members of the major religious faiths. The nature of the plan was such that it involved subtle, indirect pressures to conform to prevailing religious beliefs.

This Court in *Zorach* v. *Clauson,* 343 U.S. 306 (1952), however, faced a different type of program which has been characterized as "dismissed time" rather than "released time." Under the "dismissed time" plan, the tax-supported school facilities were not used for religious instruction nor was the same degree of compulsion involved. In *Zorach* the Court recognized the principle of religious accommodation and noted that the people of the United States are in fact a religious people. This accommodation was permitted by this Court in order to maintain a neutrality between believers in religion and nonbelievers. In explaining this position, this Court in *Zorach* stated:

> The government must be neutral when it comes to competition between religious sects, and it may not finance religious groups, undertake religious in-

> struction, blend secular and sectarian education, or use secular institutions to force one or more religions on any person, and it may not make religious observance compulsory or coerce anyone to attend church, to observe a religious holiday, or to take religious instruction, but there is no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. . . . *Id.* at 314.

This Court's decision in *Zorach* suggests that "separation of church and state" is not an independent principle, that the principle is that of religious liberty. The religion clauses of the First Amendment must be read together, and religious liberty is to be protected by the First Amendment against government action either establishing religion or prohibiting its free exercise.

Not every "judicial . . . construction which is designed to prevent a public welfare program from abridging the free exercise of religious beliefs, is for that reason *ipso facto* an establishment of religion." *Abington School District* v. *Schempp,* 374 U.S. 203, 303 (1963) (concurring opinion of Mr. Justice Brennan).

This concept of religious accommodation was adopted by this Court in *Sherbert.* In *Sherbert* the Court, as we have previously observed, noted that the state had denied Mrs. Sherbert her First Amendment rights under the free exercise clause since there was no compelling state interest to justify the infringement of her free exercise rights. The Court in *Sherbert* made clear that although judicial action declaring a practice a violation of the free exercise clause might be construed as carving out an exception on the basis of re-

ligion, such an exception may be compelled by considerations of free exercise and cannot be regarded as an establishment of religion.

This Court reviewed the relationship existing between the free exercise and establishment clauses of the First Amendment in *Walz* v. *Tax Commission of City of New York,* 397 U.S. 664, 669-70 (1970):

> Each value judgment under the religion clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the establishment and free exercise clause has prevented the kind of involvement that would tip the balance toward government control of churches or government restraint on religious practice.

It is our belief that the opinion of the Court of Appeals of the State of Indiana correctly ruled that the establishment clause of the First Amendment did not prohibit an accommodation toward the religious needs of the claimant in this case. As the Court of Appeals noted, this Court has apparently recognized that

> "government's actions impinge on different persons in dramatically different ways, so that truly even-handed treatment at times compels exempting those whose religious beliefs are exceptionally burdened by challenged state action. *In this zone of required accommodation,* the theory is that only an illusory and hostile neutrality would be achieved by pursuing a religion-blind constitutional ideal." Tribe, *American Constitutional Law,* § 14-4, p. 821 (1978) (Emphasis in original).

We feel that the Court of Appeals was correct in holding that *Sherbert* makes clear that at times govern-

ment is required under the free exercise of the First Amendment to take affirmative steps to remove barriers to the free exercise of religion by making "special provisions for religious interests in order to relieve them from both direct and indirect burdens placed on the free exercise of religion by increased governmental regulations."

We further believe that this view embraced by the Court of Appeals and by the dissenting opinion in the Indiana Supreme Court do no violence to the language or purpose of the establishment clause of the First Amendment.

CONCLUSION

For the reasons set forth herein, the judgment of the Supreme Court of the State of Indiana results in an unconstitutional denial of claimant's rights under the free exercise clause of the First Amendment to the United States Constitution and misapplies the provision of the establishment clause and therefore must be reversed.

Respectfully submitted,

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